Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1607

CALVIN T. SHERARD,
Petitioner,
v.
R. B. SHELTON, Director,
WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES
ON BEHALF OF: BETTYE J. SHERARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

Respondent does not question petitioner's statement of the opinion of the court below.

JURISDICTION

From the hereinafter contained "Statement of Facts" respondent asserts that no federal issue is herein involved. The determinations of the state appellate courts were based solely on state appellate procedure. Basis for jurisdiction stated in the petition under 28 USC § 1257(3) does not lie, there being no federal question involved.

QUESTION PRESENTED

Petitioner misstates the nature of the legal issue sought to be reviewed. The sole legal inquiry at bar is whether petitioner may relitigate the identical question previously adjudicated by the Courts of the State of Michigan and this Court?

CONSTITUTIONAL ISSUE INVOLVED

Respondent asserts that no constitutional issue is involved.

STATEMENT OF FACTS

In the Wayne Circuit Court on September 13, 1974, an order was entered requiring the petitioner to pay $22.50 per week for the support of each of two minor children (petitioner's Appendix 12). On January 3, 1975 and again on March 14, 1975, petitioner was brought into Court and found guilty of violating the support order of September 13, 1974 and placed on probation. On April 10, 1975, petitioner filed a motion to modify the support

order of September 13, 1974. After hearing on petitioner's motion to modify, on July 18, 1975, petitioner's motion was denied and an order was entered affirming the provisions of the support order of September 13, 1974.

On or about August 1, 1975, petitioner attempted an appeal, to the Court of Appeals, AS OF RIGHT from the order of July 18, 1975 as well as from the order of September 13, 1974. On respondent's motion, the Court of Appeals dismissed petitioner's appeal; order dated December 1, 1975. Subsequent thereto the Michigan Supreme Court did by Order of June 4, 1976 deny petitioner's Application for Leave to Appeal, Michigan Supreme Court No. 57629. On October 11, 1976, this Court denied petitioner's Petition for a Writ of Certiorari (No. 76-236, the foregoing documents in the record therein contained).

On October 3, 1978, petitioner again endeavored to assail the validity of the aforesaid support orders by way of motion to invalidate same. On November 29, 1978, the Honorable Myron H. Wahls, Circuit Judge of the Third Judicial Circuit of Michigan, denied petitioner's Motion to Invalidate Family Support Order (petitioner's Appendix 11). On May 16, 1979, the Court of Appeals denied his Delayed Application for Leave to Appeal (petitioner's Appendix 10), and on June 22, 1979 that tribunal denied an Application for Rehearing (petitioner's Appendix 9). Subsequent thereto on October 15, 1979 the Michigan Supreme Court denied petitioner's Delayed Application for Leave to Appeal (petitioner's Appendix 8), and similarly denied Application for Rehearing on January 22, 1980 (petitioner's Appendix 7). In the light of the foregoing the instant Petition for a Writ of Certiorari ensues.

ARGUMENT OF LAW

Respondent asserts that no federal question is presented to this Court, therefore the Petition for Writ of Certiorari ought be denied.

Although petitioner avers that he is currently appealing from the January 22, 1980 opinion of the Michigan Supreme Court denying reconsideration of an Application for Leave to Appeal (from an Order originally issued by Circuit Judge Wahls denying a motion to invalidate a Circuit Court Order of September 13, 1974), the argumentation is but subterfuge designed to circumvent the rules of appellate procedure extant in Michigan jurisprudence and this Court as well.

The record in the case at bar (as evinced from the attachments appended to petitioner's Petition for a Writ of Certiorari, No. 76-236 and the records of this Court) establish beyond peradventure that appellant now endeavors to relitigate the validity of the Wayne County Circuit Court Support Order of September 13, 1974. Said order was previously challenged in the Michigan Court of Appeals, the Michigan Supreme Court and thereafter this Court as well. In this light the Court of Appeals' Order of May 16, 1979 (petitioner's Appendix 10) quite properly found that appellant's attempt to attack the September 13, 1974 Order by Motion to Invalidate (as denied November 29, 1978) was interdicted by GCR 1963, 806.2 and *Treece* v *The Greyhound Bus Co*, 63 Mich App 63 (1975). Subsequent thereto the Michigan Supreme Court denied Application for Leave to Appeal and Reconsideration as well.

Were appellant's assertion as to the posture of the law correct, any litigant could avail himself or herself of a

limitless number of appeals by utilizing the ruse of filing motions to invalidate subsequent to final appellate disposition. The law should not condone such an abuse of appellate procedcure.

In addition to the fact that petitioner has already once prosecuted an appeal to conclusion it is clear from the records of the Michigan Supreme Court that he is now attempting to re-prosecute said appeal. Appellant is bound under state law by the former adjudicaton of the Michigan Courts, *Clements* v *Constantine*, 344 Mich 446 (1955), and same would obtain even if appellant's rationale was at this juncture different, *Monger* v *New Era Assn*, 171 Mich 614 (1912); *Ruttle* v *What Cheer Coal Min Co*, 161 Mich 150 (1910); *Allen* v *Michigan Bell Telephone Co*, 61 Mich App 62 (1975) (*lv den*).

Equally well settled is the law addressing review to the United States Supreme Court. The succeeding is illustrative:

> ". . . plaintiff argues that the denial of certiorari does not make the lower court's decision the law of the Supreme Court. While this is of course true with respect to the value of a case as precedent, the relevant fact here is that the parties have had their day in court and the denial of certiorari merely signifies that appellate review has been exhausted." *Dean Hill Country Club Inc* v *City of Knoxville*, 379 F2d 321 (CA 6, 1967) *cert den* 389 US 975, 88 S Ct 476, 19 L Ed 2d 467 (1967).

Similarly (albeit in the dominion of the criminal law) . . .

> "But denial of certiorari marks final action on state criminal proceedings. In fields other than

> habeas corpus with its unique opportunity for repetitious litigation, as demonstrated in *Dorsey* v *Gill*, 80 App DC 9, 148 F2d 857, see 7 FRD 313, the denial would make the issues res judicata." *Brown* v *Allen*, 344 US 443, 456, 73 S Ct 397, 97 L Ed 469 (1952).

Petitioner having had his days in courts ought not be permitted to further abuse the appellate process.

CONCLUSION

The decisions of the Michigan appellate courts involved no federal questions. Jurisdiction for review by the United States Supreme Court under 28 USC § 1257(3) is not present. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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Dated: May 2, 1980